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No. 88-1568 (2)

In The

Supreme Court of The United States

October Term, 1988

Dana Corporation,

Petitioner,

vs.

IPC Limited Partnership
and International Packings Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Question Presented
Seventh Amendment Right To Trial By Jury

There was substantial evidence to support the jury's implicit finding that polyacrylic was the best mode of practicing this invention. The Federal Circuit reversed that jury finding, ignoring the record below by failing to even mention the polyacrylic evidence, thereby creating a new fact record. The question presented is whether the Federal Circuit's entry of JNOV denied Dana its Seventh Amendment right to trial by jury.

Designation of Corporate Affiliations

The following is a complete list of the parent, subsidiary, and affiliate companies of IPC Limited Partnership and International Packings Corporation: Freudenberg & Co., (FRG); Carl Freudenberg (FRG); elefanten-Schuh GmbH (FRG); Klüber Lubrication München KC (FRG); Fremawerk Martini GmbH & Co., KG (FRG); Simrax GmbH, Gleitringdichtungen (FRG); Hugo Fassbender KG (FRG); Lange & Seidel (FRG); IPC Limited Partnership (USA); Freudenberg Nonwovens Limited Partnership (USA); Freudenberg Spunweb Company (USA); Escan Corporation (USA); Escan Vibration Control Prod. Inc. (USA); Disogrin Ind. Corporation (USA); Engineered Machine Products Inc. (USA); Freudenberg Nonwovens Inc. (Canada); Armet Industries Corp. (Canada); Freudenberg Wheaton, Health Care Products (USA); Freudenberg Nonwovens Ltd. (Great Britain); Freudenberg Engineering Ltd. (Great Britain); Freudenberg S.A. (France); Klüber Lubrication France S.A. (France); Freudenberg Telas sin Tejer S.A. (Spain); Industrial Massanet S.A. (Spain); Hiscasa (Hispania Caucho S.A.) (Spain); Klüber Lubrication Iberica S.A. (Spain); Elefanten Portuguesa Ltda. (Portugal); Klüber Lubrication Italia S.r.l. (Italy); Freudenberg Nao-Tecidos Ltda. & Cia. (Brazil); Freudenberg Componontes Ltda. (Brazil); Klüber Lubrication Lubrificantes Esp. Ltda. & Cia. (Brazil); Freudenberg S.A. Telas sin tejer (Argentina); Klüber Lubrication Argentina S.A. (Argentina); Simrit de Mexico S.A. de C.V. (Mexico); Disogrin Mexicana S.A. de C.V. (Mexico); Simmerwerke W. Simmer GmbH & Co. KG (Austria); Elefanten-Schuh-Ges.m.b.H., Cmuden (Austria); Klüber Lubrication Austria Ges.m.b.H (Austria); N.V. Elefant (Belgium); Klüber Lubrication Belge S.A. (Belgium); Freudenberg Nonwovens (Pty.) Ltd. (South Africa); Freudenberg Far Eastern Spunweb Comp. Ltd. (Taiwan); Conrad Tack KG (FRG); Vileda GmbH (FRG); Balster GmbH (FRG); Max Birngrube KG (FRG); Freudenberg Vertrieb Einlagestoffe KG (FRG); Gabr. E. & O. Krause GmbH (FRG); Jela Schuh GmbH (FRG); Graner GmbH & Co. (FRG); Odema Vertriebsges.mbH (FRG); Exled Warenhandels-GmbH (FRG); Kennel GmbH (FRG); Freudenberg Building Systems, Inc. (USA); Simrit Corporation (USA); Pellon Sales Corp. (USA);

Klüber Lubrication Corp. (USA); Freudenberg LP (Great Britain); Vileda Ltd. (Great Britain); Freudenberg Simrit Ltd. (Great Britain); Klüber Lubrication Great Britain Ltd. (Great Britain); Sciam S.N.C. (France); Vileda Espana S.A. (Spain); Royal Lubricants S.A. (Spain); Freudenberg S.p.A. (Italy); RG S.p.A. (Italy); Sidat S.r.l. (Italy); Freudenberg Vertriebs-KG in Osterreich (Austria); Freudenberg A/S (Norway); Simrit A.B. (Sweden); Freudenberg A.B. (Sweden); Simrit A.S. (Denmark); Freudenberg Danmark A.S. (Denmark); Klüber Lubrication A.S. (Denmark); Dantek Holstebro A.p.S. (Denmark); Freudenberg OY (Finland); Simrit Holland B.V. (Netherlands); Freudenberg Simrit AG (Switzerland); Klüber Lubrication AG (Switzerland); Freudenberg Pty. Ltd. (Australia); Klüber Lubrication (Pty.) Ltd. (South Africa); Nippon Helia Co. Ltd. (Japan); Freudenberg Beteiligungs-GmbH (FRG); Externa Handels- und Beteiligungs-GmbH (FRG); Bayerische Manufactur für Klüber Lubr. GmbH (FRG); ASTO Armaturen- u. Appartebau GmbH (FRG); Fremawerk-Vliesstoffe GmbH (FRG); Graner GmbH (FRG); Rothenburger Beteiligungs-GmbH (FRG); Windeck Corporation (USA); Freudenberg North America Inc. (USA); Lutrabond Corporation (USA); Lutrabond Company LP (USA); Lutradur Corporation (USA); Lutradur LP (USA); Pellon Corporation (USA); Intpacor Inc. (USA); Peltex Inc. (USA); Formlon Inc. (USA); Shapelon Inc. (USA); Disogrin of Canada , Ltd. (Canada); Freudenberg Holdings, Ltd. (Great Britain); Freudenberg Properties and Services Ltd. (Great Britain); Freudenberg Limited Greetland (Great Britain); Freudenberg Espana S.A. (Spain); Freudenberg Iberica S.A., S.en.C. (Spain); Freudenberg Iberica S.A. (Spain); Freudenberg Nao Tecidos Ltda. (Brazil); Klüber Lubrication Lubrificantes Especiais Ltda. (Brazil); Extrerna S.A. (Switzerland); Freudenberg Trading (HK) Ltd. (Hongkong); Klüber Lubrication Int. Ltd. (Hongkong); Administradora Simrit S.A. de C.V. (Mexico); Carl Freudenberg Wohnbauhilfe GmbH (FRG); Freudenberg Versicherungs-Vermittlungs-GmbH (FRG); Hermann Koch KG (FRG); Bondina Ltd. (Great Britain); Bondina Industrial Ltd. (Great Britain); Broadtex Ltd. (Great Britain); Frelen Limited (Great Britain); Freudenberg Leather Company, Ltd. (Great Britain); Freuden-

berg Trading Company (UK) Ltd. (Great Britain); Parbest Ltd. (Great Britain); Vilene Ltd. (Great Britain); Carl Freudenberg South Africa (Pty) Ltd. (South Africa); Lederwerke Gerhardus Beteiligungsgesellschaft mbH (Austria); Lederwerk Gerhardus (Austria); Simmerwerk GmbH (Austria); Jenkins Products Corporation (USA); Klüber Lubrication Australia Pty. Ltd. (Australia); Riseco S.A. (Spain); Sodis S.a.r.l. (France); Vica S.a.r.l. (France); Corfina S.p.A. (Italy); Freudenberg & Vilene Int. Ltd. (Hongkong); IPC Elastomer Prod. Inc. (Korea); Pharma Tech (USA); Naturin-Werk Becker & Co. (FRG); Japan Vilene Company Ltd. (Japan); Japan Lutravil Company (Japan); Nippon Externa Corporation (Japan); NOK Corporation (Japan); NOK-Megulastik Co. Ltd. (Japan); NOK-Klüber Co. Ltd. (Japan); Klüber Lubrication Mexicana S.A. de C.V. (Mexico); Nupel S.A. de C.V. (Mexico); Teneria Morelos S.A. de C.V. (Mexico); Teneria Temola S.A. de C.V (Mexico); Freudenberg Telas sin Tejer S.A. de C.V. (Mexico); Klüber Lubrication (Korea) Ltd. (Korea); Singapore Oilseal Co. (Private) Ltd. (Singapore); Rognoni S.p.A. (Italy); and Korea Vilene Comp. Ltd. (Korea).

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

I. STATEMENT OF THE CASE

Respondents IPC Limited Partnership et al. ("IPC") disagree with Petitioner Dana Corporation's ("Dana") Statement of the Case presented in its Petition for Certiorari ("Petition") since it is irrelevant to the question presented. Moreover, it is incomplete, inaccurate and misleading as it fails to portray the actual issue decided, *viz.*, whether there was a failure to disclose the "best mode" *known to the inventor at the time the patent application was filed*, i.e. that it was "necessary" to fluoride treat the rubber seal. The issue portrayed by Dana, namely that polyacrylic was the best mode, was neither offered nor decided. Further, the question as presented by Dana is merely a factual question which does not warrant review by this Court.

A. Procedural Background

Dana filed a civil action against IPC in the U.S. District Court for the Eastern District of Michigan alleging infringement of U.S. Patent No. 3,498,621 ('621 patent). A seven day jury trial was held ending with a general verdict in Dana's favor on May 20, 1987. IPC filed five motions for JNOV, all denied on December 7, 1987. IPC appealed on January 5, 1988. The United States Court of Appeals for the Federal Circuit ("Federal Circuit") reversed the District Court's denial of IPC's JNOV motion on the "best mode" question on October 26, 1988, thus obviating the need to consider the remaining four grounds of appeal. (Petition, App. A-4).

B. The Trial Court Record Established That Fluoride Treatment Of The Rubber Seal Was The "Best Mode" Contemplated By The Inventor

The named inventor, Wilson, considered fluoride treatment the best mode of practicing the invention. In his report ("the Wilson report") of November 16, 1964, just seven months before the filing date of his patent, Wilson concluded that fluoride treatment was "necessary" to satisfactory performance of the seal:

> No design was acceptable. . . when using non-treated rubber. Two... were quite acceptable at leakage control with fluoride surface treatment. Surface treatment *is necessary* to satisfactory performance of seal. . .

(emphasis supplied; Petition, App. A-6). Further, the Wilson report was not issued on the same day as the report referenced at Appendix E of Dana's Petition rather, the Wilson report issued some two weeks *later*. Thus, at best, Appendix E is an interim report and contains no conclusions on best mode.

Wilson was also surprised when, several months later, he was asked to review a draft patent application, and found it totally silent on the need for fluoride treatment.

> [Wilson] also raised the point that no reference was made [in the patent application] to fluoride treated rubber.

(Petition, App. A-7). Wilson's inquiry was just a few weeks prior to the filing date of Wilson's patent application and well after the February 17, 1965 memo relied on by Dana. (Petition, App. F). Moreover, the Appendix F memo contains no conclusions with regard to best mode. Lastly, Dana's first sales of seals covered by the patent were fluoride treated. (Petition, App. A-7).

Dana does not address the clear facts establishing fluoride treatment as the best mode, but instead improperly portrays the best mode question presented to the jury as one involving so-called "polyacrylic" material (relying heavily on the report at Petition, App. G). Yet, that report (Petition, App. G) is *dated two years after the patent application* and, is therefore irrelevant on the issue of best mode, which is to be determined at the time the patent application is filed. Moreover, the Appendix G report is only a part of a larger report which concluded that fluoride treated Buna-N rubber seals provided better oil control. Similarly, Dana ignored the testimony of its supervising engineer, Dudley Binford, who admitted that fluoride treated rubber seals gave the best results.

Thus, the *only relevant issue* tried to the jury was whether the best mode of fluoride treatment of rubber seals should have been disclosed in the patent. Dana's arguments before the jury on this issue centered on its contention (although erroneous), that as a matter of law, since fluoride treatment was well known in the art, disclosure of the treatment was not required in the patent. (Petition, App. B-5-7).

In short, Dana's presentation and arguments at trial *never concerned* the question of whether polyacrylic was the best mode. Indeed, even the District Court in denying IPC's motion JNOV on best mode characterized the issue that had been tried to the jury as:

> Defendants claimed throughout trial, and in this motion, that the fluoride treatment used by Plaintiff in its patent should have been made known to the patent examiner. Plaintiff's response throughout this proceeding has been that the fluoridation of nitril rubber is well known to those of ordinary skill in the art.
>
> ***

> In this matter, the jury was instructed on Defendant's best mode defense. Evidence was offered by both parties on the factual issue of whether Plaintiff adequately disclosed the treatment used on its patent.

(Petition, App. B-5-7).

C. The Federal Circuit Properly Reversed And Granted IPC's JNOV Motion On Best Mode

The District Court denied IPC's JNOV motion on best mode based on the erroneous conclusion of law that the best mode requirement could be satisfied by the mere reference to what the prior art discloses. In reversing this, the Federal Circuit noted that:

> . . . best mode is not satisfied by reference to the level of skill in the art, but entails a comparison of the facts known to the inventor regarding the invention at the time the application was filed and the disclosure in the specification.

(Petition, App. A-7). The Federal Circuit thereafter reviewed the facts of record in accord with the standard applicable to a district court's review of a jury verdict. (Petition, App. A-9-10). Contrary to Dana's assertions (Petition, p. 8), the Federal Circuit did not ignore evidence but instead found that the "...only evidence *probative*..." of what the inventor contemplated as the best mode was the Wilson report, the Wilson inquiry noted above and Dana's first sales of fluoride treated seals. (Petition, App. 9).

II. SUMMARY OF ARGUMENT

The question presented does not assert a conflict between courts, nor is it important, novel or concerned with a recurring issue. Instead, it is simply a factual dispute, not meritorious of certiorari. Moreover, the Federal Circuit correctly applied the law and properly acted within its discretion. The evidence unequivocally shows that fluoride treatment of the rubber seals was the best mode known to the inventor at the time of filing the application and that Dana failed to disclose it.

III. ARGUMENT

A. Dana Has Presented No Special Or Important Reasons For Granting Certiorari

Dana has failed to present any special or important reason which would warrant the granting of a writ of certiorari. S. Ct. Rule 17. Rule 17 ". . . indicate[s] the character of reasons that will be considered in reviewing petitions for certiorari." *Id.* Under Rule 17, a writ of certiorari is granted generally where there is either a conflict between the decisions of lower courts, or where an important federal issue has not been settled by this Court. *Id.* Neither is present here.

First, Dana does not assert any "conflict". Second, Dana presents no important issue. The question presented by Dana (Petition, p. i) is whether the Federal Circuit's entry of a JNOV denied Petitioner its Seventh Amendment right to trial by jury. This court settled that issue long ago in *Neely v. Martin K. Eby Construction Co., Inc.* 386 U.S. 317, 87 S. Ct. 1072, 18 L.Ed.2d. 75 (1967). In *Neely*, this Court held that a court of appeals has the authority under the Seventh Amendment to reverse a jury award and grant a JNOV itself. Contrary to Dana's assertions, the *Stevedores* case upon which Dana relies does not hold that a court of appeals may never enter a JNOV. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed.2d 798 (1962). Further, *Neely* was decided subsequent to *Stevedores*, and thus is controlling.

Worse yet, Dana's factual argument on best mode is not even part of the question presented. Even putting aside this infirmity, Dana's factual argument is fundamentally flawed as it does not rest on any important issue of general interest. An "important" issue (in the absence of a conflict) is one where resolution of it would aid other courts in interpreting and applying the law, *see e.g. U.S. v. Hougham*, 364 U.S. 310, 311-12, 81 S. Ct. 13, 15, 5 L.Ed.2d 8, 12 (1960), or would be of importance to a particular industry. *See e.g. C.I.R. v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 346-47, 91 S. Ct. 1893, 1895, 29 L.Ed.2d 519, 523 (1971). In this regard, Dana does not even disagree with the Federal Circuit's statement of the law,

but only with its application *to the facts*. (Petition, p. 10). Nor will the outcome of the case affect the automobile industry; the patent in question expired in 1987. (Petition, App. A-1).

B. This Court Should Deny Certiorari Because The Court Of Appeals Acted Properly In Reversing The District Court's Denial Of a JNOV

The Federal Circuit reversed the District Court's denial of the JNOV because that denial was based upon an erroneous interpretation of the best mode requirement of 35 USC §112. The Federal Circuit then exercised its discretion under *Neely*, 386 U.S. 317, to determine whether to grant a JNOV after examining the record under the same standards which apply to the district court, in accord with *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978), *cert. denied* 441 U.S. 906, 99 S. Ct. 1995, 60 L.Ed.2d 375 (1979). Upon a review of the evidence probative to the best mode issue, the Federal Circuit determined that reasonable minds could not have found that the best mode requirement was satisfied and granted the JNOV. (Petition, A-9, 10).

1. Dana's Failure To Disclose The Best Mode Constitutes Concealment

35 USC §112 states, "The specification . . . shall set forth the best mode contemplated by the inventor of carrying out his invention." A patent which fails to set forth the mandatory best mode requirement under 35 USC §112 is invalid. *Spectra-Physics v. Coherent, Inc.*, 827 F.2d 1524, 1538 (Fed. Cir.), *cert. denied*,___U.S.___, 108 S. Ct. 346, 98 L.Ed.2d 372 (1987). The patent here does not set forth fluoride treatment of the rubber seals; yet inventor Wilson stated it was "necessary" (Petition, App. A-6) and inquired why it was not included in his patent application. (Petition, App. A-7). Dana chose not to include it and instead, included other treatments (molybdenum disulfide and graphite) which were known to give unacceptable results. (Petition, App. H-3). This hiding of what was known to work, while disclosing what would not work, constitutes concealment.

In this regard, there is a failure of best mode where an inventor discloses more than one means for carrying out the

invention, but not the best mode known at the time the application is filed. *Spectra-Physics v. Coherent*, 827 F.2d at 1532. Further, the courts have emphasized that where the best mode contemplated by the inventor adds nothing to the prior art, a disclosure of the best mode, even if only a generic description, is still necessary. *Randomex, Inc. v. Scopus Corp.*, 849 F.2d 585, 590 (Fed. Cir. 1988).

2. The Evidence Unequivocally Shows That Fluoride Treated Rubber, Not Polyacrylic, Is The Best Mode

Dana now belatedly and desperately argues that polyacrylic is actually the best mode. (Petition, p. 10). This is a red herring. There was no implied finding in the jury's verdict that polyacrylic was the best mode. Instead, Dana's argument throughout the trial was that, although fluoride treatment was the best mode, it was well known in the art, and so it did not need to be disclosed in the patent. The district court stated:

> Defendants [IPC] claimed throughout trial, and in this motion, that the fluoride treatment used by Plaintiff should have been made known to the patent examiner. Plaintiff's response throughout this proceeding has been that fluoride treatment of nitril rubber is well known to those of ordinary skill in the art.

(Petition, App. B-5, 6). Indeed, Dana made no mention of polyacrylic in its closing argument. Nor was there any testimony that polyacrylic was the best mode. To the contrary, Dana's own witness, Chief Engineer Dudley Binford, testified that fluoride treatment of rubber was the best way of making the seals.

The filewrapper history of the patent further confirms that fluoride treatment is the best mode. To overcome the patent examiner's rejection of the claims, Dana sent successful test results (the Wilson report) which were achieved by fluoride treatment of the seals, never telling the examiner that the seals were fluoride treated. Further, the inventor stated in the portion of the Wilson report not disclosed to the Patent Office that these test results were only made possible by the fluoride treatment of the seals. (Petition, App. A-6). Finally, the seals Dana commercially sold were made of fluoride treated Buna-N rubber. (Petition, App.

A-7). In contrast, there is no evidence on the record that Dana ever commercially produced polyacrylic seals.

Dana's entire argument that polyacrylic is the best mode is based upon three interim test reports. These three reports were buried in the record along with a mass of other test results. Further, these documents were never presented to the jury for the purpose of arguing polyacrylic was the best mode. Worst of all, these test reports do not demonstrate that polyacrylic was the best mode. The first report (Petition, Appendix E) was an interim report which, contrary to Dana's assertions (Petition, p. 6), *was made prior to the Wilson report*. (Petition, App. A-6). The Appendix E Report made conclusions concerning only the heat resistance of the seals. There was no finding that polyacrylic was the best mode. (Petition, App. E). The second report (Petition, App. F) was also an interim report, and made no final conclusions as to which type of seal was best. The third report (Petition, App. G) was *completed after the patent was filed* and so could have no relevance as to what the inventor believed was the best mode *at the time the application was filed*. Futhermore, that test report was only part of a larger test report, the final conclusion of which was that fluoride treated rubber was superior to polyacrylic.

Accordingly, the Federal Circuit properly restricted its consideration to only evidence probative of what the inventor considered to be the best mode at the time the patent application was filed with the Patent Office. (Petition, App. A-9).

IV. CONCLUSION

It is respectfully requested, for the reasons presented above, that the petition for writ of certiorari be denied.

Respectfully submitted,

Dated: April 21, 1989

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